Office-Supreme Court, U.S.
FILED
AUG 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-164

In The

Supreme Court of the United States

October Term, 1982

S & S MACHINERY CO.,

Petitioner,

vs.

MASINEXPORTIMPORT and THE ROMANIAN BANK FOR FOREIGN TRADE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel of Record:

NORMAN B. ARNOFF
Attorney for Respondents
18 East 48th Street
New York, New York 10017
(212) 753-6039

Of Counsel:

LAWRENCE V. KELLY
MALONEY, VIVIANI, HIGGINS
& KELLY
45 Rockefeller Plaza
New York, New York 10111
(212) 586-6006

8097

Lyts Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 221-0008

QUESTIONS PRESENTED

By the instant petition for a writ of certiorari (the "Petition"), plaintiff-petitioner S&S Machinery Co. ("S&S") seeks the review by this Court of the opinion of the United States Court of Appeals for the Second Circuit (the "Court of Appeals"), dated April 26, 1983, unanimously affirming the opinion of the United States District Court for the Southern District of New York (the "District Court"), dated December 7, 1982, holding that defendants-respondents Masinexportimport ("Masin") and The Romanian Bank for Foreign Trade ("Romanian Bank") are agencies or instrumentalities of the Socialist Republic of Romania (the "Romanian Government") within the meaning of The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1602 et seq. (the "FSIA"), and, as such, are immune from pre-judgment attachment or the legal equivalent of that form of provisional remedy by whatever name called.

On this Petition, two questions[1] are presented for consideration by this Court pertinent to its determination as to whether or not the review sought by S&S of the aforementioned Court of Appeals' opinion should be granted.[2] (Petition, pp. i-ii).

1. Did (as S&S contends) the Court of Appeals err in holding, as the District Court also held in its aforementioned opinion, that the provisions of the Agreement on Trade Relations, between the United States of America

---

1. On its appeal to the Court of Appeals from the District Court's opinion, S&S also argued that the District Court had erred in holding that Masin and Romanian Bank are agencies or instrumentalities of the Romanian Government within the meaning of 28 U.S.C. §1603 of the FSIA, which argument the Court of Appeals, as well as the District Court, rejected on the basis of the evidence before those Courts. In not also raising this argument again on the instant Petition, S&S, therefore, apparently has now finally conceded that Masin and Romanian Bank are, in fact, agencies or instrumentalities of the Romanian Government within the meaning of that section of the FSIA.

2. Reference to the Petition, and to the page number or numbers therein to which reference is made, will be made in the manner above indicated.

("United States") and the Romanian Government of 1975, 26 U.S.T. 2305, 2308-09, T.I.A.S. No. 8159 (the "Agreement"), do not constitute an "explicit waiver", within the meaning of 28 U.S.C. §1610(d) of the FSIA, of the immunity from prejudgment attachment Masin and Romanian Bank possess under 28 U.S.C. §1609 of the FSIA?

2. Did (as S&S contends) the Court of Appeals err in holding, as the District Court also held in its opinion, that, absent such an "explicity waiver" of immunity from prejudgment attachment within the meaning of 28 U.S.C. §1610(d) of the FSIA, the Supreme Court of the State of New York (the "State Court") and the District Court could not grant S&S equivalent relief in the form of an injunction pendente lite because, and as expressly held by both the Court of Appeals and the District Court, that would eviscerate the protection by way of immunity from prejudgment attachment accorded by the Congress of the United States ("Congress") to foreign

states, including their agencies or instrumentalities, under 28 U.S.C. §1609 of the FSIA?

On this Petition, S&S argues (raising again the identical arguments previously raised by S&S, and unanimously rejected by, both the Court of Appeals and the District Court) that both of the above-stated questions should be answered in the affirmative and that the review sought by this Court therefore should be granted. (Petition, pp. 14-52).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

TREATIES

PAGE

PAGE

OTHER AUTHORITIES CITED

No. 83-164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

S&S MACHINERY CO.,

Petitioner,

—against—

MASINEXPORTIMPORT and THE ROMANIAN BANK FOR FOREIGN TRADE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel of Record:

NORMAN B. ARNOFF, ESQ.
Attorney for Respondents
Masinexportimport and
The Romanian Bank for
Foreign Trade
18 East 48th Street
New York, New York 10017
(212) 753-6039

Of Counsel:

LAWRENCE V. KELLY, ESQ.
Maloney, Viviani, Higgins
& Kelly
45 Rockefeller Plaza
New York, New York 10111
(212) 586-6006

No. 83-146

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

S&S MACHINERY CO.,

Petitioner,

- against -

MASINEXPORTIMPORT and THE ROMANIAN BANK FOR FOREIGN TRADE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The aforementioned opinion of the Court of Appeals which S&S seeks to have this Court review on its Petition is reported at 706 F.2d 411, a copy of which is also contained in the appendix to the Petition (the "Appendix"). (Appendix, pp. a22-a55).[3] The aforementioned

3. Reference to the Appendix attached to the Petition, and to the page number or numbers therein to which reference is made, will be made in the manner above indicated.

opinion of the District Court, which the Court of Appeals unanimously affirmed, is currently unreported, a copy of which is similarly contained in the Appendix. (Appendix pp. A-1 et seq.).

JURISDICTION

S&S invokes the jurisdiction of this Court under 28 U.S.C. §1254(1) and Supreme Court Rule 17. (Petition, pp. 2 and 14).

STATUTORY AND TREATY PROVISIONS INVOLVED

The pertinent provisions of the statutes (28 U.S.C. §§1609 and 1610 of the FSIA) and of the treaty (the Agreement, Art. IV, §2, 26 U.S.T. 2305, 2308-09, T.I.A.S. No. 8159) involved are set forth in the Appendix. (Appendix, pp. a56-a69).

STATEMENT OF THE CASE

On July 15, 1982, the State Court, on S&S' ex-parte application, granted an order attaching over $1,000,000.00 of Masin's and Romanian Bank's (collectively the "Respond-

ents'") assets pursuant to §6201(1) of the New York Civil Practice Law and Rules (the "CPLR"). (Appendix, a70-a74). The very next day, the New York County Sheriff levied such attachment on Respondents' assets at the Bankers Trust Company in New York ("Bankers Trust"). By notice of motion dated July 20, 1982, supported by S&S' counsel's and its treasurer's affidavits, both verified on July 21, 1982, S&S moved to confirm said order of attachment. Significantly, neither Masin nor Romanian had any actual notice whatsoever as to the basis of either the action S&S had purportedly commenced against them[4], or of the attachment levied on their

4. The gravamen of S&S complaint against Masin, which is a foreign trade company wholly owned and controlled by the Romanian Government and headquarted in Bucharest, Romania, is that S&S, a partnership wholly-owned or controlled by three individuals and headquartered in Brooklyn, New York, allegedly purchased for S&S' own account for resale in the United States certain lathes, drills and machine parts ("Machine Tools") which allegedly "without exception, is wholly defective, unuseable, unsafe, and without value". (Petition, p. 4). For a brief discussion as to the merits of such alleged complaint, see pp. 25-28.

assets, until many days after the levy of such attachment, as evidenced by S&S' moving papers for such order of attachment, consisting of S&S' counsel's and its treasurer's affidavits, both verified on July 13, 1982, S&S' summons dated July 14, 1982 and the affidavits of service filed on S&S' motion to confirm that attachment.[5] (Petition, 4-5).

On July 27, 1982, Respondents caused S&S' counsel to be served with an order to show cause by the District Court directing S&S to show cause why, inter alia, the action should not be removed to the District Court on the grounds of diversity of citizenship. Following a hearing on Respondents' motion on July

---

5. Service of process initially was purportedly made by S&S on Respondents by apparently mailing copies of the English language summons and complaint -- as well as S&S' moving papers for the order of attachment, the attachment order itself, and S&S' motion to confirm the attachment -- to Respondents in Romania, and by delivering copies of the same to a doorman at the Romanian National Tourist Office in New York City, on July 21, 1982. Thereafter, S&S, in an apparent endeavor to cure such obviously defective earlier service, then, either effected or purported to effect service on Respondents in a variety of other manners.

28, 1982, the District Court, by order dated July 29, 1982, granted that much of Respondents' motion which sought such removal, and ordered the action removed, but continued, with certain modifications however, the attachment order entered by the State Court. (Appendix, a75-a79). (Petition, 5-7).

By notice of motion dated September 13, 1982, Respondents, by their counsel, moved to vacate such attachment pursuant to the provisions of the FSIA, as well as under Federal policy relevant to the settling of international disputes by arbitration;[6] for damages based on the improper attachment of Respondents' assets pursuant to CPLR §6212(b) and (e), and for an order either dismissing the action for lack of in personam jurisdiction, or, in the alternative, to stay this action and to compel arbitration based on those facts hereinafter described (see, pp. 25-28).

---

6. See, Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See also, 9 U.S.C. §201.

which Respondents' counsel then, and until only recently (see also, pp. 25-28 , infra), believed those facts to be. In support of that motion, in addition to voluminous memoranda of law, the affidavits of the Romanian Government's Consul in the United States; an expert on Romanian law; the Romanian Bank's managing director and also of its representative in the United States; one of Masin's managers and of one of the person's in Masin's employ directly involved in the negotiations out of which this litigation (and the related litigations in New Jersey hereinafter described [see pp. 25-28 , infra]) arises, and of Respondents' counsel, respectively, together with all of the documentary proofs then available annexed as exhibits, were all submitted. S&S vigorously opposed such motion in its entirety, and in particular, that aspect of Respondents' motion seeking to compel arbitration, by way of affidavits of persons in S&S' employ and of its counsel, as well as by way of voluminous opposing memoranda of law.

Argument by counsel was heard on the motion by the District Court (per the Hon. Whitman Knapp) on October 22, 1982. By its memorandum decision and order dated December 7, 1982 (Appendix, pp. a1-a21), the District Court granted that branch of Respondents' motion for an order vacating the prior order of that Court dated July 29, 1982 (Appendix, pp. a75-a79) which (1) modified, and, as so modified adopted in all other respects, the ex parte order of attachment previously granted S&S by the State Court on July 15, 1982 (Appendix, a70-a74); and (2) enjoined pendente lite any and all negotiation of drafts or other negotiable paper connected with the letters of credit to which S&S refers in its Petition that S&S caused to be opened in Masin's favor by, and subject to collection for Masin by Romanian Bank (an organ of the Romanian Government headquarted in Bucharest, Romania) at, Bankers Trust. (Petition, pp. 1, 5, 6 and 41). In so ruling, the District Court expressly held that: (1) Respondents

are agencies or instrumentalities of the Romanian Government within the meaning of 28 U.S.C. §1603 of the FSIA (Appendix, a2-a5) and, as such; (2) Respondents are thus immune from prejudgment attachment, or the legal equivalent of that form of provisional remedy by whatever name called, under 28 U.S.C. §1609 of the FSIA, absent an "explicit waiver" of such immunity under 28 U.S.C. §1610(d) of the FSIA (Appendix, a11-a12, a13-a14); and (3) the provisions of the Agreement do not constitute such an "explicit waiver" of that immunity within the meaning of 28 U.S.C. §1610(d) of the FSIA (Appendix, a12-a13, a19-a20).

The District Court, however, denied so much of Masin's motion to dismiss the action as against Masin and referred the issue as to whether or not in personam jurisdiction exists as to Romanian Bank to a United States Magistrate (the "Magistrate"). (Appendix, a2-a10). The District Court further denied that aspect of Masin's motion, in the

alternative, to stay the action and to compel arbitration (Appendix, pp. a14-a18), which aspect of that motion Masin has since recently renewed on the basis of newly-discovered evidence. (See, pp. A-1 et seq., infra).

On December 14, 1982, S&S made application to the District Court for a stay of so much of that Court's December 7, 1982 order which vacated the subject attachment and restraints, pending determination by the Court of Appeals of S&S' appeal then not as yet filed (but later filed on December 28, 1982) from so much of said order which expressly held that Respondents are agencies or instrumentalities of the Romanian Government; that Respondents are thus immune from such pre-judgment attachment and restraints under 28 U.S.C. §1609 of the FSIA, and that the provisions of the Agreement do not constitute an "explicit waiver" of that immunity within the meaning of 28 U.S.C. §1610(d) of the

FSIA. The District Court, by order dated December 17, 1982, granted such application to the extent of staying so much of its December 7, 1982 order as vacated such attachment and restraints until January 4, 1983, at which time the District Court granted S&S leave to make such application to the Court of Appeals itself. On January 4, 1983, S&S made the aforementioned application to the Court of Appeals which that Court granted, directing, however, that S&S' appeal be accorded expedited status.

On March 4, 1983, following the submission of memoranda of law exhaustive in their presentation and analysis of all of the legal questions raised on S&S' appeal, oral argument by counsel on such appeal was heard by the Court of Appeals.

On April 26, 1983, the Court of Appeals (per the Hon. William H. Timbers) unanimously affirmed, in a lengthy, well-reasoned opinion exhaustive in its analysis of all of the

legal questions raised on S&S' appeal, the District Court's December 7, 1982 order vacating the subject attachment and restraints (Appendix a24-a25), also expressly holding in its (the Court of Appeals') opinion that: (1) Respondents are agencies or instrumentalities of the Romanian Government within the meaning of 28 U.S.C. §1603 of the FSIA (Appendix, a30-a41); (2) Respondents are thus immune from such prejudgment attachment and restraints (which are the legal equivalent of the latter form of provisional remedy) under 28 U.S.C. §1609 of the FSIA, absent an "explicit waiver" of such immunity under 28 U.S.C. §1610(d) of the FSIA (Appendix a41-a44), a51-a52); and (3) the provisions of the Agreement do not constitute such an "explicit waiver" of that immunity within the meaning of 28 U.S.C. §1610(d) of the FSIA (Appendix, a44-a51). In view of the fact that Respondents, by then, had already been wrongfully deprived

of their assets for approximately nine months through said attachment and restraints S&S had obtained ex parte in July, 1982, the Court of Appeals further expressly directed that "[t]he mandate shall issue forthwith". (Appendix, a53).

On May 11, 1983, S&S moved the Court of Appeals for a recall of the already issued mandate pending determination by this Court of S&S' instant Petition then not as yet filed (but since filed in or about July, 1983, and copies of which Respondents received service of by mail on July 29, 1983). Inasmuch as the Court of Appeals' mandate, by then, had already issued, S&S then moved in the Court of Appeals on that date, or the next day, for the recall of the mandate, and to stay its reissuance, pending determination of said motion by the Court of Appeals and of such Petition by this Court.

On the next day, May 12, 1983, S&S also

made application for and obtained ex parte from the District Court late that afternoon before Respondents' counsel could arrive in response to telephone notice given by Chambers of such application then being made, a stay of enforcement by the District Court of its December 7, 1982 order vacating the subject attachment and restraints pending determination by the Court of Appeals of S&S' aforementioned motion. On May 20, 1983, the Court of Appeals denied such motion by S&S in all respects.

On May 23, 1983, S&S also made a further ex parte application to this Court for such a stay of enforcement of the District Court's December 7, 1982 order vacating the subject attachment and restraint, which ex parte application this Court (per the Hon. Thurgood Marshall) also denied. Thereafter, in late July, 1983, S&S served and filed this Petition as previously described.

In the interim (since May 23, 1983 and before the filing of this Petition), Masin

has renewed its prior motion in the District Court to compel arbitration based on evidence newly discovered in only June, 1983. At the time when Respondents' motion to compel arbitration was originally made in September, 1982 (see, pp. 5-6 , supra), it was Respondents' counsel's belief that S&S had actually received, purchase orders for all 138 of the Machine Tools involved in this action.[7] Significantly, Masin had previously entered into a contractual relationship in or about

---

7. The basis for Respondents' and, in particular Respondents' counsel's, belief as above stated, which belief appears to have been mistaken, was the fact that copies of S&S' alleged purchase orders covering all 138 of the Machine Tools involved in this action were contained in S&S' own moving papers when this action was purportedly commenced and the subject attachment and restraints were obtained by S&S in July, 1982 in the State Court. It was not until June, 1983, when it was discovered that such belief was mistaken, based on a review conducted by Masin of its files and records in Romania in the interim, and then communicated and demonstrated to Respondents' counsel by the delegation from Romania which Masin then sent to New York to discuss the case. (See, pp. 16-25).

1977 with a corporation named American Edelstaal, Inc. ("Edel"), whereunder Masin gave Edel the exclusive distribution rights to sell these Machine Tools in the United States. Under that contractual relationship (the "Edel Contract"), which contained an arbitration clause providing for arbitration of any disputes arising between the parties, Edel was to pay for the Machine Tools it ordered from Masin by irrevocable documentary letters of credit. In 1981 (but actually even earlier than then, as also recently discovered), Edel encountered financial difficulties and sought and obtained S&S' assistance in obtaining the financing necessary for Edel's purchases of Machine Tools from Masin. In or about May, 1981, S&S thus caused to be opened at Bankers Trust in Masin's favor the irrevocable letters of credit to which S&S refers in the Petition covering the purchase price of all 138 Machine Tools involved in this action.

All but four of the S&S purchase orders contained in S&S' moving papers, covering all but four of such 138 Machine Tools, contained the express legend: "as per American Edelstaal p.o. [with the numbers of purchase orders that Edel previously had placed with Masin thereafter inserted]". (Explanation provided). Based on such evidence, as well as the other limited documentary evidence and information available when Respondents' motion to compel arbitration was originally brought on, it was then mistakenly believed, and continuing until only recently, that the course of business followed between the parties had been that: (1) Edel ordered Machine Tools from Masin; (2) because of Edel's financial difficulties, S&S had then re-ordered such Machine Tools (incorporating Edel's previous purchase orders) putting up S&S' own letters of credit; and (3) Masin then shipped the Machine Tools to S&S which, in turn, resold them to Edel.

As for those four Machine Tools covered by such four S&S purchase orders contained in S&S' moving papers which do not contain the aforementioned legend expressly referring to earlier Edel purchase orders, the limited evidence then available to Respondents' counsel consisted of Masin's acknowledgements (containing arbitration clauses) of previous purchase orders placed with Masin by S&S for machinery other than the Machine Tools covered by the Edel Contract, as well as an affidavit furnished by a person in Masin's employ with knowledge of the facts before the United States Embassy in Romania, attesting to the fact that any dispute arising between S&S and Masin with respect to said four S&S purchase orders covering said four Machine Tools would also be subject to arbitration in accordance with said parties' prior course of dealings and understanding.

Based on the foregoing, it was thus argued before the District Court on that branch of Respondents' prior motion to compel

arbitration that S&S was bound by the arbitration clause contained in the Edel Contract, and by its prior course of dealings and understanding, to arbitrate the issues in dispute in this action, which branch of the motion S&S also vigorously opposed. (See, pp. 7,8 and 9, supra). The District Court, by its December 7, 1982 order, denied that branch of Respondents' motion, however, finding that NO arbitration agreement existed between the parties. (Appendix, a14-a18, a20-a21). No cross-appeal was taken by Respondents from that aspect of the District Court's order, even though its finding in this regard was believed to be in error; it being Masin's intent, through initial discovery, to establish the existence of such enforceable arbitration agreements between the parties, and to renew (as Masin since has done), upon the basis of further evidence adduced, its prior motion to compel arbitration, which intent also was clearly disclosed to the District Court in Respondents' an-

swers setting forth the existence of such arbitration agreements as affirmative defenses to S&S' complaint, and to the Court of Appeals in Respondents' brief in opposition to S&S' appeal from the aforementioned other aspects of the District Court's order thereafter unanimously affirmed by the Court of Appeals.

On the basis of the evidence newly discovered and provided to Respondents' counsel in only June, 1983, Masin moved on or about July 8, 1983 in the District Court to renew its prior motion to compel arbitration. Briefly summarized, such evidence consists of the affidavits of various persons in Masin's employ and sent to the United States in June, 1983, attesting to the fact that, except for the aforementioned four purchase orders from S&S[8] covering only four of the

8. Apparently, Masin also received a fifth purchase order from S&S, not contained in S&S' moving papers for the subject attachment and restraints, covering spare parts for the four Machine Tools covered by the above mentioned purchase orders Masin admits receipt of from S&S.

138 Machine Tools involved in this action, Masin has no record of ever having received, and thus flatly denies receipt from S&S of, all of the other purchase orders contained in S&S' moving papers covering the other 134 Machine Tools involved herein. Moreover, and as shown by the further documentary proofs submitted on that motion, Edel also expressly confirmed to Masin in writing, at Masin's express written request, that the previous Edel purchase orders received by Masin, for which S&S subsequently opened letters of credit in Masin's favor at Bankers Trust covering those 134 Machine Tools, were all for Edel's account in accordance with the Edel Contract, and that S&S merely opened said letters of credit pursuant to financial and business arrangements entered into between S&S and Edel in or about January, 1981. The significance of such evidence is, of course, that it establishes that S&S did not ". . . [contract] anew to buy certain merchandise identified as that previously contracted

for by [Edel]", as found by the District Court based on the evidence before it on Masin's prior motion to compel arbitration (Appendix, a15, clarification provided), and that S&S is, in fact, bound by the arbitration clause in the Edel Contract respecting any controversy between S&S and Masin involving at least those 134 Machine Tools.

As for the remaining four Machine Tools involved in this action for which Masin does not dispute receipt of purchase orders from S&S, additional evidence was submitted on Respondents' renewed motion, both by way of affidavits and documentary proofs, further showing, inter alia, that, since in or about January, 1981, S&S and Edel appear to have been actually one and the same companies for all practical intents and purposes (otherwise, Masin would not, and could not, have sold S&S those four Machine Tools covered by the Edel Contract), and that S&S, like Edel is bound to arbitrate any disputes with Masin related to such four Machine Tools in accord-

ance with the Edel Contract as well as S&S' prior course of dealings and understanding with Masin. Even S&S' own pre-trial list filed in response to the Magistrate's March 2, 1983 pre-trial order is further proof that Edel was, in fact, the real purchaser of the Machine Tools involved in this action, in that: (1) of the 45 Machine Tools consisting of lathes which S&S listed as having been received from Masin, all but one of the 21 lathes S&S listed as having been later sold, appear to have been, in fact, sold by Edel to the ultimate customer or user, and (2) of the 25 Machine Tools consisting of drills which S&S listed as having been received from Masin, all but four of the nine drills S&S listed as having been later sold, appear to have been, in fact, sold by Edel to the ultimate customer or user. As for the unsold Machine Tools listed by S&S as having been received from Masin, the locations of all but one of those unsold Machine Tools are listed at S&S' warehouse location at the

"NAVY YARD" where, in all likelihood, those Machine Tools have never even been uncrated; and as for the other one unsold Machine Tool listed as being located at S&S' other warehouse location, that Machine Tool is listed as being "Damaged". Suffice it to say that, in view of the foregoing evidence now before the District Court on Respondents' renewed motion to compel arbitration, S&S' contentions in this action that it purchased the Machine Tools involved herein for its own account, and not Edel's, and that such "machinery, without exception, is wholly defective, unusable, unsafe, and without value" (Petition, pp. 304), are beyond credibility.

Significantly, S&S has not as yet responded to Respondents' aforementioned renewed motion to compel arbitration. Instead, and at a pre-trial conference had with the District Court on July 12, 1983, S&S' counsel, contending that S&S is possessed of proof that Masin did, in fact, receive those pur-

chase orders contained in S&S' moving papers which Masin now denies having received and that Masin is, therefore, in bad faith in bringing on such renewed motion, asserted that S&S should not be required to respond to that motion, unless Masin posts security in the events that the District Court: (1) should deny that motion, and (2) should also further find, as contended by S&S' counsel, that, in bringing on the motion, Masin acted in bad faith. The District Court, acting on S&S' application at that conference that Masin be required to post such security, directed that Masin provide a bond or other collateral in the amount of $5,000.00 as a pre-condition to Masin's proceeding with such motion and S&S being required to respond thereto. Masin is now in the process of providing such bond or collateral in that amount. As also indicated by the District Court at that pre-trial conference, Masin's renewed motion to compel arbitration cannot be heard, in any event, until October, 1983.

In the interim -- i.e., since such pre-trial conference with the District Court, and a subsequent pre-trial conference had with the District Court relating to a second action further instituted against Masin in the District Court (the subject matter of which involves machinery other than the Machine Tools involved in this action which S&S contracted to purchase from Masin, and for S&S' breach of which contract Masin has already recovered on arbitration award in its favor on May 23, 1983), and until Masin's aforementioned renewed motion to compel arbitration is heard and determined -- Masin, in addition to having to respond to this Petition subsequently served and filed by S&S, has also had to transport, and is still in the process of so transporting, its files and records from Romania to the United States in response to S&S' demand for voluminous production of documents. Masin also will be required to incur even further, considerable

cost and expense in connection with the numerous depositions of alleged witnesses that S&S has noticed in a substantial number of states throughout the United States, and even Canada, commencing in September, 1983 and continuing into 1984.

Finally, no statement of this case would be complete without consideration also of the two related actions (the "Edel Actions") instituted by Edel against Respondents in the Superior Court of New Jersey (the "N.J. State Court"). When Edel could not obtain from Masin an extension requested by Edel (because of Edel's continuing financial difficulties) of certain letters of credit and bankers acceptances issued by the First National State Bank of New Jersey ("First National") and Edel in Masin's favor, covering other Machine Tools ordered by Edel from Masin, Edel (a New York corporation) purportedly commenced, on or about October 15, 1981, the first of these Edel Actions against

Respondents, as well as First National, in the N.J. State Court. In that action, Edel (like S&S here) also obtained, ex parte, orders restraining First National from paying, and also from honoring, and Respondents, therefore, from collecting, over $500,000 worth of such letters of credit and bankers acceptances issued by First National and Edel. Later, but 12 days after S&S purportedly instituted the instant action, on July 15, 1982, (and by which time the parties apparently had been unable to resolve the matters in dispute in these actions through negotiations between themselves directly), Edel purportedly commenced the second of these Edel Actions, on or about July 27, 1982, against Respondents and First National in the N.J. State Court. In that second action, Edel (like S&S here) also further obtained, ex parte, an order of attachment against Respondents and First National which was levied upon certain warehouse receipts

held by First National in Respondents' favor covering Machine Tools consigned to Edel.

The gravamen of Edel's complaint in each of these Edel Actions was substantially the same as that of S&S' complaint in this case.

The Edel Actions were later removed by Respondents from the N.J. State Court to the United States District Court for the District of New Jersey (the "N.J. District Court"), pursuant to 28 U.S.C. §1446 and 9 U.S.C. §205, on or about August 27, 1982, and were docketed in that Court as Civil Actions Nos. 82-2815 and 82-2814 and assigned to the Hon. Frederick B. Lacey, United States Judge. On or about that date, Respondents also moved in the N.J. District Court to confirm such removal of the Edel Actions; to vacate the restraints and attachment obtained by Edel in those actions and for damages based on Edel's wrongful re-

straints and attachment of Respondents' assets, and to dismiss both actions for lack of in personam jurisdiction, or, in the alternative, to stay such actions and to compel arbitration based on the arbitration clause contained in the Edel Contract. Edel, in addition to opposing such motion, also cross-moved to dismiss Respondents' removal petitions.

Oral argument by counsel on the aforementioned motion and cross-motion was heard by the N.J. District Court on October 18, 1982 (four days before oral argument was heard by the District Court on Respondents' aforementioned virtually identical motion in this case.

By opinion and order dated February 28, 1983, the N.J. District Court (independently and without relying on the District Court's aforementioned December 7, 1982 opinion): (1) denied Edel's cross-motions to dismiss Respondents' removal petitions;

(2) granted Respondents' motions to vacate the restraints and attachments obtained by Edel in the Edel Actions, also expressly finding that Respondents are entitled to protection as "foreign state[s]" within the meaning of §1603(a) of the FSIA, 28 U.S.C. §1602-1611, and thus immune from prejudgment attachment or equivalent forms of legal restraint under §1609 of the FSIA; and (3) granted Respondents' motions to dismiss both actions for lack of in personam jurisdiction based on improper service of process under 28 U.S.C. §1608 of the FSIA.[9] Such opinion and order, a copy of which is contained in the Appendix hereto at pages A1- et seq, is currently unreported.

The N.J. District Court, however, denied Respondents' motions for damages based on

9. Unlike SVS in this case, Edel never attempted to cure its earlier, equally defective services of process when it purportedly commenced the Edel Actions and obtained, ex parte, the restraints and attachment in those actions.

Edel's wrongful restraints and attachment of their assets, finding, inter alia, no right to damages under New Jersey law where property has been wrongfully attached where, as in the Edel Actions, no bond was required as a prerequisite for the interim restraints Edel obtained, unlike New York. See, CPLR §1612(e). Significantly, neither the N.J. State Court, nor the N.J. District Court following removal of the Edel Actions, required Edel to provide such a bond.

No appeal was taken by either Edel or First National from the aforementioned order of the N.J. District Court. Respondents, however, have timely appealed from so much of that order which denied Respondents damages for Edel's wrongful restraints and attachment of their assets, which appeal is unopposed by Edel and First National and is now pending before the United States Court of Appeals for the Third Circuit for argument and determination.

The aftermath of the N.J. District Court's aforementioned disposition of the Edel Actions completes a full statement of this case. First National has subsequently dishonored and refused to accept and pay approximately $200,000.00 worth of bankers acceptances issued by Edel on the purported ground that such bankers acceptances were not timely presented for acceptance by Respondents, even though (at those times when such presentments otherwise would have been due and made by Respondents) First National was enjoined from paying or honoring any such drafts by the aforementioned totally invalid restraints Edel had obtained in its favor, ex parte, in the first of the Edel Actions. For those letters of credit and bankers acceptances accepted by First National prior to the issuance of such restraints, which that bank did, in fact, pay Respondents, totalling approximately $355,868.79, First National has since insti-

tuted suit against Edel, and the New York corporation[10] through which S&S controls, if not also owns, Edel, in the N.J. District Court.

In short, and not even taking into account the losses and considerable expense which Masin has incurred and is still incurring as a consequence of S&S actions in this case, Masin was deprived for a period of nearly one and one-half years of assets to which Masin was entitled, and has incurred the loss of a substantial amount of those assets, as well as interest, counsel fees and

---

10. Based on written advices received from Edel's former counsel in the Edel Actions, as well as from the U.S. Court of Appeals for the Third Circuit, any notification to be given to Edel in connection with Respondents' appeal pending before that Court are to be addressed to S&S' business manager either in care of S&S' business address in Brooklyn, N.Y., or a post office box office number in that city since provided by that individual. Significantly, and although the Magistrate, at a pre-trial conference had in this case on July 26, 1983, directed S&S' counsel to supply an affidavit by S&S' principals disclosing the nature of that partnership's relationship to the corporation referenced above, no such affidavit has as yet been supplied.

other costs and expenses of litigation (continuing to date), running into Hundreds of Thousands of Dollars, as a consequence of Edel's actions -- which actions, it is respectfully submitted, can be in no way viewed, under any application of plain common sense, as unrelated to S&S' actions in this case. The true facts of this case are, therefore, far different from those presented and implied in the Petition before this Court. (See, Petition, pp. 2-12, 14-23).

EXISTENCE OF JURISDICTION BELOW

The District Court's jurisdiction of this case is based on diversity of citzenship pursuant to 28 U.S.C. §1332. See also, 28 U.S.C. §1446 and 9 U.S.C. §205. The Court of Appeals' jurisdiction of this case on appeal was based on 28 U.S.C. §1292 and under Swift & Co. Packers v. Componia Colombiana Del Caribe, S.A., 339 U.S. 684 (1950). (See Petition, p. 13).

REASONS FOR DENYING THE WRIT

It is respectfully submitted that the reasons for denying the writ should by now be fairly obvious to the Court.

Firstly, an examination of the opinions of both the Court of Appeals and the District Court clearly discloses that both of the arguments made in the Petition were previously made by S&S before each of those Courts and were carefully considered and were uniformly rejected by both such Courts in well-reasoned legal opinions. (Appendix a22-a55, a1-a21). As hereafter further demonstrated, no questions are raised by this Petition which merit review by this Court under either Supreme Court Rule 17, or this Court's decisions in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), on remand, 272 F.Supp. 836, aff'd, 383 F.2d 166; Dames & Moore v. Regan, 453 U.S. 654 (1981); Beal v. Doe, 432 U.S. 438 (1977); Schlgegenhauf v. Holder, 379 U.S. 104 (1964), and Societe Internationale

Pour Participations Industrielles Et Commerciales, S.A. v. Brownell, 357 U.S. 197, 203 (1958). See also, Stern and Gressman, Supreme Court Practice, 5th ed., pp. 278-279.

Secondly, and by making again by this Petition the identical arguments previously made by S&S before and uniformly rejected by both the Court of Appeals and District Court, the relevance of the true facts and circumstances involved in this case is altogether painfully clear. (See pp. 2-34). As previously demonstrated, S&S and Edel have each followed a concerted course of conduct in seeking to avoid their contractual obligations to Masin by commencing this and all of the other actions mentioned in an invalid manner through improper methods of service of process, and by obtaining ex parte orders of attachments and restraints on Masin's assets, all designed to bring significant economic pressure to bear upon Masin and Romanian Bank, in a patent effort

to wrongfully coerce Masin into compromising its rights as against S&S and Edel so as to avoid the costs and expenses and burden of the litigation of these actions many thousands of miles from Respondents' places of business in Romania. It is respectfully submitted that S&S' filing of this Petition, making again those same already uniformly rejected arguments, but necessitating response thereto on Respondents' behalf, is also part and parcel of that course of conduct and should not be countenanced.

The Petition, therefore, should be denied.

1. THE PROVISIONS OF THE AGREEMENT DO NOT CONSTITUTE AN "EXPLICIT WAIVER", WITHIN THE MEANING OF 28 U.S.C. §1610(d) OF THE FSIA, OF THE IMMUNITY FROM PREJUDGMENT ATTACHMENT WHICH MASIN AND ROMANIAN BANK, AS AGENCIES OR INSTRUMENTALITIES OF THE ROMANIAN GOVERNMENT WITHIN THE MEANING OF 28 U.S.C. §1603 OF THE FSIA, POSSESS UNDER 28 U.S.C. §1609 OF THE FSIA.

S&S' reading of the FSIA is patently incorrect. 28 U.S.C. §1609 of the FSIA,

insofar as is here relevant, expressly provides, without distinction, that the property in the United States of a "foreign state" (which includes Respondents under 28 U.S.C. §1603[a] and [b] of the FSIA) "shall be immune from attachment, arrest and execution except as provided in . . ." 28 U.S.C. §1610(d) of the FSIA. (Appendix, a56). 28 U.S.C. §1610(d), which S&S erroneously contends is applicable here, expressly provides that there shall be no such immunity from prejudgement attachment in any action brought in Federal or State Courts if:

> (1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver of the foreign state may purport to effect except in accordance with the terms of the waiver, and
>
> (2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to obtain jurisdiction. (Emphasis supplied). (Appendix a61-a62).

Under the plain language of 28 U.S.C.

§§1609 and 1610(d), therefore,[11] in order for Respondents' property to be subject to pre-judgment attachment in the United States, Respondents "must have explicitly waived [their] immunity from such attachments". Security Pacific National Bank v. Iran, 513 F.Supp. 864, 879 (C.D. Cal. 1981) (emphasis added). See also, Reading & Bates Corp. v. National Iranian Oil Co., 478 F.Supp. 724, 728 (S.D.N.Y. 1979); Behring International, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 393 (D.N.J. 1979), and Libra Bank Limited v. Banco Nacional de Costa Rica, S.A., 676 F.2d 47, 49 (2d Cir. 1982). As explained by the Behring Court: "Congress did not intend to allow implied waivers of immunity from attachment prior to judgment under the Immunities Act. 475 F.Supp. at 393.

11. See, Rubin v. United States, 449 U.S. 424 (1981); State of Connecticut v. United States, E.P.A., 656 F.2d 902 (2d Cir. 1981); Albright v. United States, 631 F.2d 915 (D.C. Cir. 1980) and United States v. J.W. Robinson, 359 F.Supp. 52 (S.D. Fla. 1973). See also 28 U.S.C. §1610 (a), (b) and (c) (Appendix a55, a56-a61), and compare with 28 U.S.C. §1610(d) (Appendix, a61-a62), in the light of 28 U.S.C. §1609(a56).

Inasmuch as no proof whatsoever has been offered or exists establishing that Respondents themselves have explicitly waived their immunity from prejudgment attachment within the meaning of 28 U.S.C. §1610(d), the only relevant issue on the first question presented by this case is whether or not the Romanian Government itself explicitly waived such immunity.

As held by the Court of Appeals in Libra Bank Ltd. v. Banco Nacional de Costa Rica, supra, 676, F.2d 49-50, and as reaffirmed by that Court in its opinion in this case, while a foreign state, of course, need not intone in haec verbia the words "prejudgment attachment" in order to waive its immunity under 28 U.S.C. §1610(d), such "a waiver of immunity from prejudgment attachment must be explicit in the common sense meaning of that term: the asserted waiver must demonstrate unambiguously the foreign state's intention to waive its immunity from prejudgment attachment in this country". (Appendix, a44).

S&S erroneously argues that the delphic phrase "or other liability" contained in Article IV, §2 of the Agreement between the United States and the Romanian Government (Appendix, a63) constitutes such an explicit waiver of immunity, and that the opinions of both the Court of Appeals and the District Court uniformly rejecting that argument (Appendix, a44-a51, a11-a13) are in error. (Petition, pp. 23-40). Suffice it to say that the well-reasoned opinions of those Courts speak for themselves and totally refute such argument.

In an endeavor to persuade this Court to grant certiorari, S&S further erroneously contends that the Court of Appeals' unanimous affirmance of the District Court's rejection of S&S' argument in this regard, has created a conflict between the Court of Appeals and the District Courts. (Petition, pp. 20-21, 24-40). The basis for such erroneous contention lies in the fact that Article XI, §4

of the Treaty of Amity, Economic Relations, and Consular Rights between the United States, 8 U.S.T. 899, T.I.A.S. 3853 (1955) (the "Treaty of Amity"), quoted in part in footnote 6 at page 25 of the Petition, contains language similar to, but nonetheless different from, that contained in Article IV, §2 of the Agreement (Appendix, a63), which language S&S asserts (as it did before the Court of Appeals and the District Court) has been held to constitute an explicit waiver of immunity from prejudgment attachment within the meaning of 28 U.S.C. §1610(d) of the FSIA. S&S' citations to support this contention, however, are highly misleading and evidence no such conflict as S&S contends exists.

American International Group, Inc. v. Islamic Republic of Iran, 493 F.Supp. 522, (D. D.C. 1980), remanded 657 F.2d 430 (D.C. Cir. 1981), is wholly irrelevant in that the case does not even discuss a foreign state's immunity from prejudgment attachment. Further,

the restraints imposed there were granted after plaintiff's motion for partial summary judgment was granted and thus constituted post-judgment restraints.[12] On appeal, the Circuit Court there also remanded the action to the District Court with instructions to "vacate the attachments and all other preliminary and provisional remedies". Id, 657, F.2d at 449. Harris Corporation v. National Iranian Radio & Television, 645 F.2d 1 (5th Cir. 1981); Itek Corp. v. First National Bank of Boston, 511 F.Supp. 1341 (D. Mass. 1981), and Touche Ross v. Manufacturers Hanover Trust Co. & Bank Saderat, 107 Mis.2d 438 (Sup.Ct. N.Y. Co. 1980), aff'd. 86 A.D. 2d 990 (1st Dept. 1982), are equally

12. The provisions of the FSIA regarding waiver of immunity from post-judgment attachment are vastly different from the provisions of that Act regarding waiver of immunity from prejudgment attachment. 28 U.S.C. §1601(a) provides that a foreign state's property is immune from post-judgment attachment unless the foreign state has waived its immunity "either explicitly or by implication". 28 U.S.C. §1610 (d), however provides that a foreign state's property shall be immune from attachment prior to the entry of judgment unless "the foreign state has explicitly waived its immunity prior to judgment". (Emphasis added).

unavailing. None of those cases even discuss the FSIA, such cases being decided under either the Iranian Hostage Agreement or Executive Order No. 12170, 44 Fed.Reg. 65-729 (1979). Similarly, Jet Line Services, Inc. v. M/V Marsa El Haniga, 462 F.Supp. 1165 (D.C. Md. 1978) and Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir. 1981), cited at page 34 of the Petition; as well as DeSanchez v. Banco Central de Nicaragua, 515 F.Supp. 900 (E.D. La. 1981), In re Rio Grande Transport, Inc., 516 F.Supp. 1155 (S.D.N.Y. 1981), and Arango v. Guzman Travel Advisors Corp., 421 F.2d 1371 (5th Cir. Fla. 1980), cited by S&S before the Courts below (but not here), are totally inapposite to the case at bar, in that those cases dealt with the question of immunity from suit, which is entirely different from the question at bar.[13]

13. The FSIA's provisions regarding waiver of immunity from suit are vastly different from its provisions regarding waiver of immunity from prejudgment attachment. 28 U.S.C. §1605(a)(1) provides that a foreign state shall not be immune from suit where it has

Indeed, the only cases cited by S&S which would appear to lend any support whatsoever to S&S' aforementioned contention are the two bench rulings made by the District Court in Reading & Bates Corp. v. National Iranian Oil Co., No. 79 Civ. 6034 (S.D.N.Y. 1979), and Electronic Data Systems Corp. v. Social Security Organization of Government of Iran, No. 79 Civ. 1711 (S.D.N.Y. 1979), remanded 610 F.2d 94 (2d Cir. 1979). S&S fails to mention, however, that in Reading & Bates Corp. v. National Iranian Oil Co., 478 F.Supp. 724 (S.D.N.Y. 1979), the District Court held that, while the language of the Treaty of Amity constituted an explicit waiver of immunity from execution attachment,

(footnote continued from previous page) "waived its immunity either explicitly or by implication". This provision, being identical to the provision on waiver of immunity from post-judgment attachment, 28 U.S.C. §1610(a), is equally inapposite to the provision on prejudgment immunity which requires a foreign state to have "explicitly waived its immunity from attachment prior to judgment". 28 U.S.C. §1610(d). (Emphasis added).

it did not constitute an "explicit" waiver of immunity from prejudgment attachment. Id at 728. Likewise, in Electronic Data Systems Corp. v. Social Security Organization of Government of Iran, S&S fails to mention that, on remand, the Court of Appeals held:

> In light of the rapidly changing relationship between the United States and the Islamic Republic of Iran, we remand this case to the district court for reconsideration of its order of attachment [to secure enforcement of a judgment expected in a contract action pending between such parties in the Northern District of Texas], which was entered prior to the seizure of American hostages at the American embassy in Teheran, and other critical conflicts affecting the relationship of Iran and the United States. On remand, the district court may ascertain the position of the Department of State concerning the defendants' right of access to the United States courts under the extraordinary circumstances now prevailing. In addition, the court may consider the effect of Executive Order 12170, November 14, 1979, (the so-called "freeze" order) upon the necessity for its order of attachment. Finally, the court may review its interpretation of the Treaty of Amity, Economic Relations and Consular Rights, August 15, 1955, United States-Iran, 8 U.S.T. 899, in light of the State Department documents made available to this Court by the parties and by amicus curiae, Department of State.
>
> Id at 610 F.2d at 95 (Emphasis and clarification added).

S&S further fails to make mention of the fact that in E-Systems, Inc. v. Islamic Republic of Iran, 491 F.Supp. 1294, 1300-02, (N.D. Tex. 1980), the District Court held that it was unreasonable to infer from the less than exact language of the Treaty of Amity that the signatories intended thereby to permit pre-judgment attachment of the assets of that foreign state (Iran) in the United States.

See also, likewise holding that the language of the Treaty of Amith does not constitute an explicit waiver of immunity from prejudgment attachment within the meaning of §28 U.S.C. §1610(d) of the FSIA: New England Merchants National Bank v. Iran Power Generation and Transmission Co., 502 F.Supp. 120, 126-27, (S.D.N.Y. 1980), remanded on other grounds, 646 F.2d 779 (2d Cir. 1981); Marshalk v. Iran National Airlines Corp., 518 F.Supp. 69, rev'd, 657 F.2d 3 (2d Cir. 1981); Security Pacific National Bank v. Iran, 513 F.Supp. 864, 879-80, (C.D. Cal. 1981); Behning International, Inc. v. Imperial Iranian Air

Force, 475 F.Supp. 383, 392-93 (D.N.J. 1979), and Libra Bank Ltd. v. Banco Nacional de Costa Rica, supra, 676 F.2d 47, 49-50 (2d Cir. 1982).

With regard to the case of The Chase Manhattan Bank, N.A. v. The State of Iran, which S&S cited as 79 Civ. 6644, and in connection with which S&S urges this Court to consider an affidavit apparently submitted in that case as to the purported intent of the signatories to the Treaty of Amity, S&S blithely ignores the fact that in that case, the District Court denied the injunction sought by plaintiff, finding it "unnecessary to decide the sovereign immunity issue raised [therein]". Id at 484 F.Supp. 832 at 386 (S.D.N.Y. 1980). (Clarification supplied). Moreover, whatever the intent of the signatories to the Treaty of Amity may have been is irrelevant to the case at bar, the only relevant question being the intent of the United States and the Romanian Government with re-

gard to the language of the Agreement.[14] In the case at bar -- unlike the siguations in Electronic Data Systems, v. Social Security Organization of Iran, supra, and The Chase Manhattan Bank, N.A. v. The State of Iran, supra -- and despite requests made by both S&S' and Respondents' respective counsels of the State Department, after the District Court's December 7, 1982 opinion, for an

14. Likewise irrelevant here, for the reason above stated, are the Friendship, Commerce and Navigation Treaties between the United States and: Nicaragua, 9 U.S.T. 449, T.I.A.S. 9024 (1956); Korea, 8 U.S.T., 2217, T.I.A.S. 3947 (1956); Netherlands, 8 U.S.T. 2043, T.I.A.S. 3942 (1956); Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. 3593 (1954); Japan, 4 U.S.T. 2063, T.I.A.S. 2863 (1953); Denmark, 12 U.S.T. 908, T.I.A.S. 4797 (1951); Greece, 5 U.S.T. 1829, T.I.A.S. 3057 (1951); Israel, 5 U.S.T. 550, T.I.A.S. 2948 (1951); Ireland, 1 U.S.T. 785, T.I.A.S. 2155 (1950); and Italy, 63 Stat. 2225, T.I.A.S. 1965 (1948). Moreover, to put into question all of such treaties and the dealings of the United States with those foreign nations, without the existence of any justiciable controversy involving same extant at this time, as S&S would urge this Court to now do (see Petition, pp. 17-20), suffice it to say, would appear to be not only contrary to the interests of the United States, but also the previous holdings of this Court in analogous circumstances.

official statement as to its position with regard to the Agreement on the question here presented, the State Department has not done so.[15]

Finally, and in a "last ditch" endeavor to persuade this Court to grant the writ, S&S raises the spectre that the opinions of the Court of Appeals and the District Court must be reversed in that they purportedly deprive litigants before American courts of a substantial protection normally provided by the American legal system (Petition, pp. 18-19, 21-23). In support of such erroneous contension, S&S in an astonishing misreading of the FSIA and of the Congressional purpose behind its enactment, argues (as it did before the Court of Appeals and the District Court)

15. The footnote at pp. 28-29 of the Petition is factually inaccurate. On the oral argument therein referred to, the Court of Appeals merely inquired as to whether or not the State Department's position regarding the Agreement had been sought; it did not request the parties to obtain a statement from the State Department as to the latter.

that an agency or instrumentality of a foreign state engaged in commercial activity in the United States is wholly unprotected by the FSIA from prejudgment attachment and should be treated for all purposes as a private corporation. Nothing, however, could be further from the truth. The provisions of the FSIA and the Congressional intent behind its enactment are pellucidly clear. See 28 U.S.C. §§1602, 1603 et seq., and H.R. Rep. No. 1487, 94th Cong., 2d Sess. 27, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6614.

S&S' misreading of the FSIA and of Congress' purpose in enacting it obviously seeks to confuse immunity from suit -- which is afforded to foreign non-commercial entities -- and immunity from attachment -- which is afforded to all foreign entities and their agencies or instrumentalities, whether commercial or otherwise.[16] Immunity from suit,

16. See, Geveke & Co. International Inc. v. Kompania Di Awa I Glektrisidat Di Korsou, N.V., 482 F.Supp. 660 (S.D.N.Y. 1979). See also,

and from post-judgment attachment, can be waived either "explicitly or by implication". 28 U.S.C. §§1605(a)(1) and 1610(a). Immunity from prejudgment attachment, however, can only be "explicitly waived". 28 U.S.C. §1610(d).

(footnote continued from previous page) American Edelstaal Inc. v. First National State Bank of New Jersey, Masinexportimport and The Romanian Bank for Foreign Trade, Civil No. 82-2814 and 82-2815 (D.N.J. 1983), pp. A1-A ; East Europe Domestic International Sales Corp. v. Terra, 467 F.Supp. 383 (S.D.N.Y.) aff'd mem., 610 F.2d 806 (2d Cir. 1979); Yessenin Volpin v. Novosti Press Agency, 443 F.Supp. 849 (S.D.N.Y. 1978); Jet Line Services Inc. v. M/V Marsa El Hariqa, supra at p. 43; Velidor v. L/P/G Benghazi, supra at p. 44; Behring International, Inc. v. Imperial Iranian Air Force, supra at p. 47; J. Baranello & Sons. v. Hausmann Industries, Inc., 86 F.R.D. 151 (E.D.N.Y. 1980); Pavlo v. James, 437 F. Supp. 125 (S.D.N.Y. 1977); Ziperman v. Frontier Hotel of Las Vegas, 50 A.D. 2d 581, 374 N.Y.S. 2d 697 (2d Dept. 1975); Badger v. Lehigh Valley R.R., 45 A.D.2d 601, 360 N.Y.S. 523 (4th Dept. 1974), and compare, Edlow International Co. v. Nuklearna Elektrarna Krsko, 441 F.Supp. 827 (D.D.C. 1977). Pan American Tankers Corp. v. Republic of Vietnam, 291 F. Supp. 49 IS.D.N.Y. 1968), cited by S&S before the Courts below but not here, was decided prior to the enactment of the FSIA and also is factually distinguishable from this case. See also, Kahale & Vega, Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States, 18 Col. J. of Transnational L. 211, 228-29 (1979).

It thus is respectfully submitted that both the Court of Appeals and the District Court held correctly on the question presented, and that the writ requested should be denied.

2. ABSENT AN "EXPLICIT WAIVER" OF IMMUNITY FROM PREJUDGMENT ATTACHMENT WITHIN THE MEANING OF 28 U.S.C. §1610(d) OF THE FISA, THE STATE COURT AND THE DISTRICT COURT COULD NOT GRANT S&S EQUIVALENT RELIEF IN THE FORM OF AN INJUNCTION PENDENTE LITE BECAUSE THAT WOULD EVISCERATE THE PROTECTION BY WAY OF IMMUNITY FROM PREJUDGMENT ATTACHMENT ACCORDED BY CONGRESS TO FOREIGN STATES, INCLUDING THEIR AGENCIES OR INSTRUMENTALITIES SUCH AS MASIN AND ROMANIAN BANK, UNDER 28 U.S.C. §1609 OF THE FSIA.

The short answers to S&S' equally erroneous argument that the Courts below erred in finding that the FSIA acted as a bar to the issuance of injunctive relief pendente lite in this case (Petition, pp. 41-51), have already been provided by both the District Court in its opinion (Appendix, a13-a14) and the Court of Appeals in its opinion (Appendix a51-a52), which answers really say all that

need be said in response to this argument and to which the attention of this Court is, therefore, respectfully referred.[17] In accord, see, American Edelstaal, Inc. v. The First National State Bank of New Jersey, Masinexportimport and The Romanian Bank for Foreign Trade, infra, at pp. A1 et seq.; and Behring International, Inc. v. Imperial Iranian Air Force, supra, at pp. 47-48). See, 28 U.S.C. §§1602, 1603 et seq., and compare, Rubin v. United States, supra at p. 39; State of Connecticut v. United States, E.P.A., supra at p. 39; United States v. J.W. Robinson, supra at p. 39, and Albright v. United States, supra at p. 39.

17. S&S' citations of Harris Corporation v. National Iranian Radio & Television, supra, at p. 43, and Itek Corp. v. First National Bank of Boston, supra at p. 43, are unavailing. As previously noted, neither case even discussed the FSIA, both cases being decided under the Iranian Hostage Agreement. And as an examination of Touche Ross & Co. v. Manufacturers Hanover Trust Co., supra at p. 43, and Jet Line Services, Inc. v. M/V Marsa El Hariga, supra, at p. 44, will also demonstrate, S&S' reliance on those cases to support is argument in this regard is equally misplaced.

As for S&S' bold assertion that Respondents have not challenged the propriety of the granting of injunctive relief on the merits (Petition, p. 51) -- which injunctive relief as previously noted, S&S obtained ex parte -- that assertion is, at best, totally misleading, and, at worst, an outright falsehood. Following the District Court's denial of Respondents' motion to dismiss this action, or, in the alternative, to compel arbitration, Respondents each interposed verified answers flatly denying S&S' allegations in this case on the merits. In addition to the various affirmative defenses contained in such answers (including, but not limited to, the defense that the issues in dispute herein are subject to arbitration), Respondents also counterclaimed therein for damages based on S&S' breach of its contractual obligations and its other wrongful conduct towards Respondents. Simply stated, it is Respondents' position, as set forth in their papers in this action, that S&S and Edel have each and

concertedly acted in bad faith towards Respondents, and that, by proceeding in this case and in the Edel Actions in the manner hereinbefore described, S&S and Edel wrongfully seek to avoid their contractual and legal obligations to Respondents, and to Masin in particular, through sheer economic coersion. (See, pp. 2-34, infra). That being the case -- as Respondents fully intend to, and will, prove either in arbitration, or in this action itself if such arbitration be not ultimately compelled -- then, it is respectfully submitted that, other than for S&S' bald and spurious assertions, S&S could not have met its burden of demonstrating the necessity for issuance and continuance in effect of the injunctive relief pendente lite that S&S obtained ex parte, since vacated pursuant to the provisions of the FSIA. See, Caulfield v. Board of Education of the City of New York, 583 F.2d 605, 610 (2d Cir. 1978), and Jack Kahn Music v. Baldwin Piano & Organ, 05 F.2d 755 (2d Cir. 1979). See also,

KMW Intern. v. Chase Manhattan Bank, N.A., 606 F.2d 10 (2d Cir. 1979).

It is thus respectfully submitted that both the Court of Appeals and the District Court held correctly on the question presented and that the writ requested should be denied.

CONCLUSION

For the reasons demonstrated, it is respectfully submitted that the Petition should be denied, and with costs and counsel fees awarded to Respondents.

Respectfully submitted,

NORMAN B. ARNOFF, ESQ.
Counsel of Record
Attorney for Respondents
Masinexportimport and The
Romanian Bank for Foreign
Trade
18 East 48th Street
New York, New York 10017
(212) 753-6039

Of Counsel:

LAWRENCE V. KELLY, ESQ.
Maloney, Viviani, Higgins
& Kelly
45 Rockefeller Plaza
New York, New York 10111
(212) 586-6006

A P P E N D I X

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

----------x

AMERICAN EDELSTAAL, INC.,

Plaintiff,

FIRST NATIONAL STATE BANK OF NEW JERSEY, et al.,

Defendants.

OPINION

82 Civ. 2814, 2815 (D.J.L.)

----------x

LACEY, D. J.

This matter is before the court pursuant to plaintiff's motion, styled "Motion to Dismiss Petition for Removal" and defendants' motion, styled "Motion to Confirm Removal." Defendants also move this court for an order vacating "attachments" and dismissing the action for lack of personal jurisdiction. In the alternative, defendants seek an order from this court compelling arbitration.

This controversy arises out of two contracts entered into in 1977. By the first, American Edelstaal, Inc. (Edel) contracted to

purchase certain equipment from Masinexport-import (Masin), and by the second, Masin contracted to service such equipment. As part of its obligation pursuant to the contracts, Edel executed certain irrevocable letters of credit with the First National State Bank of New Jersey (First National). The sales and service contracts between Masin and Edel also contained certain arbitration clauses.

A dispute arose between Masin and Edel over the terms and performance of their contracts. Edel filed suit in New Jersey Superior Court on October 15, 1981, alleging certain claims for relief under state contract law. Edel also named First National as a party defendant in that action and sought and obtained an order restraining Masin from access to the letters of credit held by First National pursuant to the Masin-Edel contracts.

Masin attempted to remove the New Jersey State court action to the United States District

Court for the Southern District of New York. Masin sought essentially the same relief as it seeks in the action before this court. The Southern District Court, by Judge Owen, held a hearing on whether the state court action had been properly removed.

While the parties awaited Judge Owen's reserved decision on the propriety of removal, Edel commenced a second lawsuit against defendants in New Jersey Superior Court. This second lawsuit was identical to the first, except that it sought to attach warehouse receipts of defendants which Edel had found in New Jersey.

Judge Owen subsequently ruled that the contracts were subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201 et seq., which permitted removal of the state court action to the federal court, but that the case had been removed to the wrong federal district court. See Exhibit I to

Pleading and Affidavit of Lawrence Kelly. Judge Owen thereupon dismissed the action for improper venue. (A motion for reconsideration of this ruling was filed but was withdrawn when the action was removed to the New Jersey federal district court.)

Defendants then sought removal of both state court action [sic] to this court. Accompanying the removal petition were the instant motions by defendants. Edel responded with various cross-motions, also the subject of this opinion.

REMOVAL

Section 205 of Title 9 of the United States Code provides, in pertinent part:

> § 205. Removal of cases from State courts.
>
> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division

> embracing the place where the action or proceeding is pending.

Judge Owen found that this section applied to the contracts at issue in this lawsuit, because of the arbitration clauses contained in the contracts. He dismissed the actions for improper venue, however, because removal was not brought to "the district and division embracing the place where the action or proceeding is pending."

I can see no reason for deciding contrary to the decision of Judge Owen. It is undisputed that both contracts contain arbitration clauses. The action pending in the state court related to these arbitration agreements because the state court would have had to decide whether the clauses required arbitration of the instant dispute. Judge Owen expressly found that § 205 applied without expressing an opinion whether the clauses were mandatory.

The only remaining question is whether removal was timely under § 205. Section 205 permits removal "at any time before the trial thereof." Although Judge Owen believed that default judgment had been entered against defendants in one of the state court actions, at the hearing before this court Edel conceded that judgment had not yet been entered in either action. See Transcript of Hearing on Motion at 3. Thus, I conclude that both actions were removed to this court before trial. Accordingly, I find that § 205 applies, that removal to this court was timely, and that the motion "dismiss" [sic] the petition for removal must be denied.

Because I conclude that removal to this court was proper under 9 U.S.C. § 205, it is unnecessary to decide whether removal was appropriate under 28 U.S.C. § 1441(d) and 28 U.S.C. § 1446(b).

APPLICABILITY OF THE FOREIGN SOVEREIGN IMMUNITIES ACT, (FSIA) 28 U.S.C. §§ 1602-1611

a) "Agency or Instrumentality of a Foreign State"

Section 1603(b) of Title 28 of the United States Code provides:

> (b) An "agency or instrumentality of a foreign state" means any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this Title, nor created under the laws of any third country.

According to the affidavit of Justin Herscovici, submitted in support of defendant's motions, the Socialist Republic of Romania is a Socialist state in which the economy is based on state ownership of the means of production. Herscovici Aff. ¶ 2. Consequently, all factories, plants, banks and commercial enterprises are owned by the state. Id. Specifi-

cally, both Masin and the remaining foreign defendant to thise [sic] actions, The Romanian Bank For Foreign Trade (Romanian Bank), are completely state-owned. Id. ¶ 3.

If Mr. Herscovici's affidavit is believed, both Masin and the Romanian Bank are agencies or instrumentalities of a foreign state within the meaning of FSIA. See Herman v. El Al Israel Airlines, 502 F. Supp. 277, 278 (S.D.N.Y. 1980); Jet Line Services v. M/V Marso El Hariga, 462 F. Supp. 1165, 1172-73 (D. Md. 1978). Plaintiff has not challenged this affidavit. In fact, at the hearing on these motions, plaintiff's counsel stated, in response to the court's inquiry as to whether plaintiff disputed that defendants were wholly-owned by the Romanian government, "I'm hard pressed to do this at this stage, Judge, given the supplementary material that was furnished to the court." Transcript, supra, at 10. Thus, the court concludes that defendants Masin and the Romanian Bank are

agencies or instrumentalities of a foreign state within the meaning of FSIA.

b) Vacating Attachments

A finding that defendants are agencies or instrumentalities of a foreign state does not mean that they are immune from this court's jurisdiction, nor do defendants claim this to be so. Federal courts do have jurisdiciton over such instrumentalities where they are engaged, as here, in commercial activity in the United States. 28 U.S.C. § 1605(a)(2). Nevertheless, certain consequences follow from the designation of these defendants as agencies of a foreign state. First, as agencies of a foreign state, the defendants' property in the United States is immune from attachment, 28 U.S.C. § 1609, with certain exceptions which are not claimed to be applicable here. See 28 U.S.C. § 1610.

The order entered in the first of the two state court actions provided that the defendant

First National not honor any drafts presented to it by the defendants Masin or the Romanian Bank against the irrevocable letters of credit issued on behalf of plaintiff Edel. See Order to Show Cause and Restraint, Exhibit B to Pleading and Affidavit of Lawrence Kelly. This restraint was continued and expanded in an order signed by the state court on November 2, 1981. See id. Exhibit D. In the second of the state court actions, plaintiff moved for a writ of attachment against certain warehouse receipts owned by defendants and located in the State of New Jersey. No state court order resolving this motion appears in the record. However, an order dated August 2, 1982, adjourned the return date of this motion and restrained defendant First National from releasing these warehouse recipts to defendants Masin and Romanian Bank.

Plaintiff argues that the restraints imposed by the state courts are not "attachments" within the meaning of 28 U.S.C. § 1609.

The implication of this argument is that defendants are not immune from the restraints imposed by the state court orders.

In Behring Intern. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.N.J. 1979), Chief Judge Fisher faced the issue of whether the Iranian Air Force's property was immune from prejudgment attachment. There, an Order to Show Cause was signed which included temporary restraints "in the nature of an attachment." Behring, supra, 475 F. Supp. at 387. The temporary restraints prohibited the defendants from removing any of their property from the court's jurisdiction or from cancelling a letter of credit. Id. The Iranian Air Force moved to dissolve this restraint on the grounds that § 1609 immunized defendant's property from prejudgment attachment. Judge Fisher held that § 1609 did immunize defendant's property from prejudgment attachment, but nevertheless concluded that a treaty between Iran and the United

States authorized prejudgment attachment notwithstanding the FSIA.

It is clear that Judge Fisher regarded the temporary restraints as the legal equivalent of "attachments" as that term is used in § 1609. So here, the interim restraints contained in the several orders of the New Jersey Superior Court have virtually the same effect as a writ of attachment would have. Hence, I conclude that the interim restraints entered by the state courts are "attachments" within the meaning of 28 U.S.C. § 1609, despite that they are not truly "attachments" as that term is used in state court. See N.J.S.A. 2A:26-2; New Jersey Court Rules 4:60-1 et seq. Accordingly, inasmuch as the property of defendants Masin and the Romanian Bank is immune from prejudgment attachment, these interim restraints must be vacated.

c) Damages for Wrongful Attachment

Defendants Masin and the Romanian Bank contend they are entitled to damages and attorneys' fees resulting from the restraining orders entered in the state court. They await a ruling from this court on the availability of damages, at which time they will submit proofs of damage.

The FSIA does not expressly authorize an award of damages for "wrongful" attachment. Defendants cite, among other cases, Behring Intern. v. Iranian Air Force, supra, in support of their argument that they are entitled to damages here. In Behring, however, Chief Judge Fisher was concerned with the amount of bond which he should, in his discretion, require of plaintiff, from which "damages" would be awarded should it develop that the attachments were improvidently granted. Behring, supra, 475 F. Supp. at 408. See also Rule 64, Fed.R.Civ.P; New Jersey Court Rule 4:60-5(d). His discussion

is abbreviated and cannot be read as establishing a right to damages in circumstances, such as those present here, where a bond has not been required as a prerequisite for interim restraints. I therefore decline to read Behring as supporting defendants' claim for damages here.

Similarly, Aerotrade v. Haiti, 416 F. Supp. 1114 (S.D.N.Y. 1976), aff'd, 552 F.2d 60 (2d Cir. 1977), and Gaskin v. Stomm Handel GmbH, 390 F. Supp. 361 (S.D.N.Y. 1975), awarded damages for attachment based upon provisions of New York Attachment Law which expressly authorize damage claims for improper attachment. See CPLR § 6212.

Defendants do not refer the court to any statutory authority for the proposition that damages may be awarded for interim restraints where, as here, no bond has been posted to cover such damages resulting from such restraints. I conclude that defendants do not have a right to

damages in the circumstances of this case. Furthermore, even if I were to conclude that the court has discretion to award damages, I would not do so here. I am persuaded by plaintiff's argument that "[w]hat was done here was done in good faith and under the aegis of a state court order having followed the rules to obtain that order." Transcript, supra, at 15.

d) Service of Process

The conclusion that defendants are agencies of a foreign state also has an effect on the manner in which service of process may be effected. First, 28 U.S.C. § 1603(a) provides that "[a] 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Next, 28 U.S.C. § 1330(b), concerning actions against foreign states, provides:

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have

jurisdiction under subsection (a) where service has not been made under section 1608 of this title.

There is no dispute that, apart from the issue of validity of service, this court has jurisdiciton pursuant to 28 U.S.C. § 1330(a). Then, 28 U.S.C. § 1608 provides, in relevant part:

> (b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:
>
> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or
>
> (3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

> (A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or
>
> (B) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or
>
> (C) as directed by order of the court consistent with the law of the place where service is to be made.

The issue is whether service has been effected as required by the statute.

Plaintiff claims that service was made pursuant to a "special arrangement for service." The contract between the parties provides:

> All notices, communications, offers, acceptances, and the exerice [sic] of options required to be given pursuant to this agreement shall be in writing and shall be sent by registered mail with return receipt requested at the address hereinbefore set forth . . . .

In Mendick Realty Co. v. Permanent Mission of Libya to the United States, No. 81-5410 (S.D.N.Y. Nov. 16, 1981), plaintiff claimed such a "special arrangement for service" under § 1608

existed where the lease agreement with defendant provided that

> a bill, statement, notice or communication which Landlord may desire to be required to give to Tenant, shall be deemed sufficiently given or rendered if, in writing, delivered to Tenant personally or sent by registered mail to Tenant . . . .

The court concluded that the provision did not constitute a special arrangement for service. The court wrote: "The reference in paragraph 27 of the lease to 'a bill, statement, notice or communication' from the landlord does not extend to court process, under the maxim ejusdem generis." Mendick Realty, supra, memorandum op. at 7. Although the question is a close one, I conclude that the provision in the contract involved here does not constitute a special arrangement for service. The language of the agreement refers to "[a]ll notices, communications . . . required to be given pursuant to this agreement . . . ." There is no express reference to court process, nor is one fairly to be implied from the entire agreement.

Furthermore, the legislative history of this statute provides, "Section 1608 sets forth the exclusive procedures with respect to service on . . . a foreign state or its political subdivisions, agencies or instrumentalities." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 23, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6622. Thus, I conclude that the fact that the state court ordered service be accomplished in the manner undertaken here does not make such service valid. There is no indication that the state court was aware of the applicability of FSIA when it signed the Order to Show Cause providing the method of service.

Thus, I conclude: (1) that removal was proper; (2) that the attachments must be vacated; (3) that defendants are not entitled to damages; and (4) that the action must be

dismissed without prejudice because of failure to effect service of process. Hence, I do not reach the issue of the arbitrability of the underlying dispute.

S/ (signed)
FREDRICK B. LACEY
UNITED STATES DISTRICT JUDGE

Dated: February 28, 1983

A P P E N D I X

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AMERICAN EDELSTAAL, INC., Plaintiff,	ORDER
FIRST NATIONAL STATE BANK OF NEW JERSEY, et al., Defendants.	82 Civ. 2814, 2815 (D.J.L.)

This matter having been opened to the court upon the motion of defendants for confirmation of removal and for other relief, and plaintiff having cross-moved for dismissal of the removal petition, and the court having considered the arguments and submissions of counsel;

IT IS HEREBY ORDERED (1) that the motion to dismiss the removal petition is denied; (2) that the motion to vacate the interim restraints entered by the State is granted; (3) that the

motion for damages for wrongful attachments is denied; (4) that the motion to dismiss these actions for improper service is granted, all in accordance with an opinion filed this date in the office of the clerk of the court.

S/ (signed)
FREDERICK B. LACEY
UNITED STATES DISTRICT JUDGE

Dated: February 28, 1983